

DECISION



13398
S. Kraus
Proc 71
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

[Protest of Bid Rejection For Failure to Acknowledge Amendment]

FILE: B-196065

DATE: April 9, 1980

MATTER OF: Alaskan Office Equipment, Inc. DLG 04315

DIGEST:

Where bid fails to acknowledge addendum having possible significant effect on price, so that it is not clear without reference to amendment that bidder intends to bind itself to all material requirements, failure to acknowledge cannot be waived as minor informality and bid is properly for rejection.

Alaskan Office Equipment, Inc. (Alaskan) protests the rejection of its bid submitted in response to solicitation No. GSD-10DPR-90134, issued by the General Services Administration (GSA), for the repair and maintenance of electric typewriters on a time and material basis. Alaskan's bid was rejected for failure to acknowledge an amendment. AGC 000017

The solicitation was one of several issued by GSA which required that parts be billed at the contractor's cost. GSA reports that a number of bidders, including a major contractor, Olivetti, had expressed confusion as to the meaning of "parts at cost." As a result, GSA amended the solicitations which had not yet opened to clarify what was meant by the term. The amendment added the underscored portion to the following IFB paragraph:

"The contractor shall charge for labor an amount equal to the hourly rate multiplied by the number of direct labor hours performed. Except as otherwise provided in this contract, all parts and materials furnished on work performed under this contract will be billed to the Government at the contractor's cost. Cost

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is to be determined in accordance with FPR 1-15.205.22. Under this regulation, the amount billed for purchased parts and the materials generally include the contractor's invoice cost, adjusted for available discounts, and inbound transportation costs. The amount billed shall not exceed: (1) the cost of the same or similar parts or materials obtained in the normal course of business for the contractor's commercial work, or (2) the lowest cost reasonably available to the contractor, whichever is lower."

As was stated in 37 Comp. Gen. 785 (1958), the failure to acknowledge a material amendment in the manner required by the invitation or amendment cannot be waived. This general rule is predicated upon the principle that the acceptance of a bid which disregards a material aspect of an invitation, as amended, would be prejudicial to the other bidders. A failure to acknowledge may be waived as a minor informality pursuant to Federal Procurement Regulations (FPR) 1-2.405(d)(2) which allows waiver if:

* * * * *

"(2) The amendment involves only a matter of form or is one which has either no effect or merely a trivial or negligible effect on price, quantity, quality, or delivery of the item bid upon."

Alaskan contends that its failure to acknowledge the amendment should have been waived as a minor informality. Alaskan argues that the amendment in question does not substantively change the contract language because it only clarifies what was meant by the term "cost," and the clarification has no effect on the term as it was commonly understood by the industry. In support of this position, Alaskan argues that FPR 1-15.102, requiring incorporation of the cost principles, and FPR 1-3.406-1, covering time and materials contracts, provide for the

application of the cost principles of FPR 1-15.205-22 to the cost reimbursement portion of the contract. Therefore, it argues the amendment was merely a "matter of form."

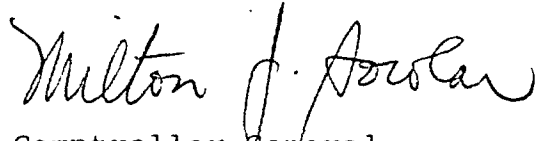
Even assuming that the FPR sections Alaskan relied upon would require the Government to apply the cost principles of FPR 1-15.205-22 to the instant solicitation, in this case the solicitation was ambiguous enough to warrant a clarifying amendment. While GSA may have incorporated the essence of the section into the contract by requiring that parts be billed at "cost," a bidder might not have appreciated the full impact of that requirement and might have sought to take issue with this interpretation after award. When the bidders, including Olivetti, were unsure of their obligations under the contract with respect to cost and GSA was made aware of this problem, GSA issued the amendment to cure the ambiguity in the solicitation as to cost factors.

The fact that Alaskan correctly interpreted the solicitation does not mean that no other reasonable interpretation existed. An ambiguous solicitation results when the solicitation is subject to more than one interpretation. In our opinion, the mere statement that "parts are billed at cost" may not have been sufficiently precise to define the meaning of "cost" as intended in this case. For example, the language does not indicate the effect of trade discounts, rebates or allowances on the determination of the cost of materials involved, which could cause uncertainty as to the exact nature of the bidder's obligations.

At least one other bidder found the solicitation ambiguous, and in fact after the amendment Olivetti withdrew from the bidding competition. (In its withdrawal letter dated June 26, 1979, Olivetti indicated that "in order for our corporation to conform to regulation FPR 1-15.205-226(e) it would entail establishment of new price lists for the Government and a substantial added cost for administration of a new pricing procedure.")

We have held that a bid, as here, which fails to acknowledge an addendum having a significant effect on price, so that it is not clear that a bidder is bound to all material requirements without regard to the amendment, cannot be waived as a minor informality or irregularity and is properly for rejection. Central Delivery Service, B-186413, August 4, 1976, 76-2 CPD 125; Decor Maintenance Company, Inc., B-194190, July 6, 1979, 79-2 CPD 12.

The protest therefore is denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For The Comptroller General
of the United States